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voiced proceeding was not served within the state and did not appear; for the reason that the fact that the statute did not warrant attachments in divorce proceedings was an irregularity which could not be availed of collaterally. *Twigg v. O'Meara* (1882), 59 Iowa 326. See also *Thurston v. Thurston* (1894), 58 Minn. 279; *Wood v. Price* (1911), 79 N. J. Eq. 1; *Benner v. Benner* (1900), 63 Ohio St. 220; *Bailey v. Bailey* (1900), 127 N. Car. 474.
J. R. R.

INSURANCE POLICIES AS ASSETS IN BANKRUPTCY.—The Supreme Court of the United States, in the recent case of *Cohen v. Samuels*, 38 Sup. Ct. 36, has put an end to a method, approved by some of the lower Federal Courts, whereby a person could create a fund which would be completely under his control but which would nevertheless be protected against any claim on the part of his trustee in bankruptcy. The circumstances in the principal case were as follows: Samuels had taken out ordinary life insurance policies, with the usual provisions as to loan and surrender values, payable to certain of his relatives as beneficiaries, but with a provision reserving to Samuels the right to change the beneficiary without the latter's consent. At the time of Samuels' bankruptcy these surrender values were about \$1,200, and if before that time Samuels had wished to realize on such surrender values, all that he need have done was to name himself as beneficiary and thus become entitled to the amount. He became bankrupt, and now insists that the policies do not pass to his trustee in bankruptcy as assets because, not being payable to himself, his estate, or personal representatives, they do not fall within the language of § 70, which defines what property shall pass to the trustee. And his claim was apparently so well fortified by authority that the District Court for the Southern District of New York felt impelled to uphold it, and was supported by the Circuit Court of Appeals for the Second Circuit, where, however, HUGH, C. J., registered a vigorous dissent.

The difficulty arises from the language of § 70, which provides that the trustee shall be vested with the title of the bankrupt to various classes of property, including " * * * (3) powers which he might have exercised for his own benefit, but not those which he might have exercised for some other person; * * * (5) property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him: Provided, That when any bankrupt shall have any insurance policy which has a cash surrender value payable to himself, his estate, or personal representatives, he may, within thirty days after the cash surrender value has been ascertained and stated to the trustee by the company issuing the same, pay or secure to the trustee the sum so ascertained and stated, and continue to hold, own and carry such policy free from the claims of the creditors, * * * otherwise the policy shall pass to the trustee as assets; * * *" In the earlier years of the administration of the BANKRUPTCY ACT there was considerable doubt as to the precise effect of this proviso as to life-insurance policies. Some courts took the view that such policies passed to the trustee as property which the bankrupt "could by any

means have transferred" except that he might retain those having a surrender value by paying this value to the trustee; under this view it is clear that the trustee would be entitled to a policy like those under consideration, because it could have been transferred by the bankrupt. Other courts took the view that no policies passed to the trustee except those having a surrender value, and they only to the extent of that value. The latter view was finally adopted by the Supreme Court of the United States in *Burlingham v. Crouse*, 228 U. S. 459 and *Everett v. Judson*, 228 U. S. 474, though in the earlier case of *Hiscock v. Mertens*, 205 U. S. 202, there is some indication that the court at that time inclined toward the former view.

In his opinion in *Burlingham v. Crouse*, Mr. Justice DAY used the words: "We think it was the purpose of Congress to pass to the trustee that sum which was available to the bankrupt at the time of bankruptcy as a cash asset * * *" And those words have frequently been construed as a limitation on the interest which the trustee can obtain. In REMINGTON, BANKRUPTCY, § 1002, for instance, the rule is expressed as follows: "The trustee is entitled to the cash surrender value, and only to the cash surrender value that would have been obtainable from the insurance company at the date of the filing of the bankruptcy petition, upon all policies on the bankrupt's life that are not exempt by state law and that are payable to the bankrupt, his estate or personal representative." Practically the same proposition is stated in COLLIER, BANKRUPTCY, (11th Ed.) 1139. Such a limitation, restricting the trustee's right to the cash surrender value payable at the time of the filing of the petition, and to policies payable to the bankrupt, was hardly necessary to the decision of the *Burlingham* case, but, as is seen above, it was adopted as law by text writers (though REMINGTON insisted that the contrary view was preferable) and was followed in most of the subsequently arising cases in which the precise point was presented. In most of these cases the policy was, under state laws, exempt from the claims of creditors, and under § 6 of the BANKRUPTCY ACT would therefore not pass to the trustee in any event. *In re Cohen*, 230 Fed. 733; *Frederick v. Insurance Co.*, 235 Fed. 639. But the Circuit Court of Appeals for the Second Circuit, in *In re Arkin*, 231 Fed. 947, 146 C. C. A. 143, decided that such a policy did not pass to the trustee, and the same court came to the same conclusion in the principal case when it was before them, in *In re Samuels*, 237 Fed. 796, 151 C. C. A. 38. In both these cases the court relied on its previous decision in *In re Hammel & Co.*, 221 Fed. 56, 137 C.C.A. 80, but as is clearly pointed out by HOUGH, C. J., in his dissent in 237 Fed. 799, 151 C. C. A. 41, the *Hammel* case dealt with a policy which did not have a surrender value, but only a loan value. In the case of *In re Bonwillain*, 232 Fed. 370, the District Court for the Eastern District of Louisiana held that under the law of Louisiana such a policy would pass to the trustee, but it seems that this case, like the somewhat similar case of *Malone v. Cohn*, 230 Fed. 882, 150 C. C. A. 144, is based on a misconception of the effect of § 70 as declared in *Burlingham v. Crouse*, and treats the policy as property governed by the general language of the section, and not as a peculiar class of property governed by the proviso.

The Supreme Court of the United States, when confronted by the problem

in the principal case, did not minimize the difficulties raised by the language in *Burlingham v. Crouse* which seems to put a strict limitation upon the trustee's rights but cut the Gordian knot by invoking clause (3) of § 70, which vests the trustee in bankruptcy with powers which the bankrupt could have exercised for his own benefit. This way out of the difficulty brings about a desirable result, though it somewhat weakens the theory that the proviso in § 70 is a complete, exclusive, self-contained expression of all the law as to life-insurance policies in bankruptcy. And the court says: "Our conclusions would be the same if we regarded the proviso alone", justifying its conclusion by the obviously undesirable result of a contrary holding in making an insurance policy "a shelter for valuable assets and, it might be, for fraud".

It seems clear that the Circuit Court of Appeals gave an unwarranted effect to the decision in *Burlingham v. Crouse*, and that the Supreme Court has in the principal case laid down a much more desirable rule.

E. H.